

1 provision of the Stock Purchase Agreement. Plaintiff counters that
2 additional discovery is needed to substantiate her claim.

3 4 **I. Summary Judgment Standard**

5 Summary judgment "shall be rendered forthwith if the
6 pleadings, depositions, answers to interrogatories, and admissions
7 on file, together with the affidavits, if any, show that there is
8 no genuine issue as to any material fact and that the moving party
9 is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).
10 The burden of demonstrating the absence of a genuine issue of
11 material fact lies with the moving party, and for this purpose, the
12 material lodged by the moving party must be viewed in the light
13 most favorable to the nonmoving party. *Adickes v. S.H. Kress &*
14 *Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los Angeles*, 141
15 F.3d 1373, 1378 (9th Cir. 1998). A material issue of fact is one
16 that affects the outcome of the litigation and requires a trial to
17 resolve the differing versions of the truth. *Lynn v. Sheet Metal*
18 *Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir. 1986); *S.E.C. v.*
19 *Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

20 Once the moving party presents evidence that would call for
21 judgment as a matter of law at trial if left uncontroverted, the
22 respondent must show by specific facts the existence of a genuine
23 issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
24 250 (1986). "[T]here is no issue for trial unless there is
25 sufficient evidence favoring the nonmoving party for a jury to
26 return a verdict for that party. If the evidence is merely
27 colorable, or is not significantly probative, summary judgment may
28 be granted." *Id.* at 249-50 (citations omitted). "A mere scintilla

1 of evidence will not do, for a jury is permitted to draw only those
2 inferences of which the evidence is reasonably susceptible; it may
3 not resort to speculation." *British Airways Bd. v. Boeing Co.*, 585
4 F.2d 946, 952 (9th Cir. 1978); see also *Daubert v. Merrell Dow*
5 *Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) ("[I]n the event
6 the trial court concludes that the scintilla of evidence presented
7 supporting a position is insufficient to allow a reasonable juror
8 to conclude that the position more likely than not is true, the
9 court remains free . . . to grant summary judgment."). Moreover,
10 "[i]f the factual context makes the non-moving party's claim of a
11 disputed fact implausible, then that party must come forward with
12 more persuasive evidence than otherwise would be necessary to show
13 there is a genuine issue for trial." *Blue Ridge Insurance Co. v.*
14 *Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998) (citing *Cal.*
15 *Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*,
16 818 F.2d 1466, 1468 (9th Cir. 1987)). Conclusory allegations that
17 are unsupported by factual data cannot defeat a motion for summary
18 judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

19 20 **II. Plaintiff's Motion for Partial Summary Judgment**

21 Under the Stock Purchase Agreement, the sale of Raven
22 Management, Inc., for \$500,000 consisted of two parts: a \$125,000
23 cash closing payment, and a \$375,000 secured promissory note. (Pl.
24 Mot'n for Partial Summ. J., Ex. A (Stock Purch. Ag't at 13)). The
25 promissory note was amortized over twenty years, and payments were
26 to be made in monthly installments of principal and accrued
27 interest over a five-year term. (Id.)

28 The critical provision of this agreement, which lies at the

1 heart of this lawsuit and both parties' motions for summary
2 judgment, provides as follows, in full:

3
4 8.9 Right of Set-Off. Upon notice to the Seller
5 specifying in reasonable detail the basis for such set-
6 off, the Buyer shall be entitled to set off any amount to
7 which it may be entitled under this Article Eight against
8 amounts otherwise payable under the Promissory Note. The
9 exercise of such Right of set-off by the Buyer in good
10 faith, whether or not ultimately determined to be
11 justified, will not constitute an event of default under
12 the Promissory Note or the Security Agreement (or under
13 any other agreement or instrument securing or assuring
14 the payment of the Promissory Note). Neither the
15 exercise of nor the failure to exercise such Right of
16 set-off will constitute an election of remedies or limit
17 the Buyer in any manner in the enforcement of any other
18 Rights that may be available to it. (Id. at 34).

12 The defendant ("Buyer") claims to be exercising its rights under
13 this provision in response to alleged actions taken by the
14 plaintiff ("Seller") in breach of the contract. Specifically,
15 defendant alleges that the plaintiff referred one of the principal
16 clients of a subsidiary association management company of the
17 defendant to a competing association management company. (Def.
18 Opp'n at 3). The client subsequently terminated its contract with
19 the defendant's subsidiary. (Id.).

20 In response to this alleged breach, defendant ceased its
21 monthly payments on the promissory note, invoking Section 8.9 of
22 the agreement.¹ (Id. at 3-4). Defendant initially claimed that
23 the value of its set-off was \$131,981.82, meaning that it would not
24 resume its monthly payments on the promissory note until the
25 equivalent of that amount had come due. (Id. at 4). The amount
26

27 ¹ Defendant additionally terminated plaintiff's employment with Raven Management, which had
28 been another condition of the Stock Purchase Agreement. Neither party contests the validity of that
action, so the court will not address it.

1 reflected defendant's calculation of its damages as a result of
2 the plaintiff's actions as of May 22, 2007. Defendant has since
3 revised this figure upwards twice, on September 7, 2007, and again
4 on December 20, 2007, and given plaintiff notice of these revisions
5 in letters on those dates. (Id.). Each new figure grew to include
6 the attorney's fees and costs of litigation associated with the
7 plaintiff's pursuit of this action. Defendant argues that the
8 inclusion of these costs is justified as they are costs "arising,
9 directly or indirectly, from, asserted against or incurred by
10 reason of, resulting in any manner from, or relating in any manner
11 to" the plaintiff's breach of the Stock Purchase Agreement. (Id.
12 At 2 (quoting Ex. Stock Purch. Ag't at 31)).

13 Plaintiff argues that as a matter of law she is entitled to
14 the difference between defendant's claimed offset as of May 22,
15 2007, and the amount due on the promissory note, totaling
16 \$234,402.44. (Pl. Mot'n for Partial Summ. J. at 3). Plaintiff
17 claims that this amount is undisputed, but ignores the defendant's
18 subsequent revisions of its claimed offsets, which significantly
19 affect her calculations, and which the defendant changes on an
20 ongoing basis. Without addressing the validity of the defendant's
21 use of the contract's offset provision, or its validity, the court
22 concludes that there is a genuine issue of material fact with
23 respect to the amount owed under the offset, and that plaintiff's
24 motion for partial summary judgment fails.

25 26 **III. Defendant's Cross-Motion for Summary Judgment**

27 Defendant moves for summary judgment on the issue of
28 plaintiff's claim of bad faith by the defendant in its exercise of

1 the off-set provision of the Stock Purchase Agreement. Defendant
2 asserts that plaintiff admitted referring a large client of
3 defendant's subsidiary association management company to a
4 competing company, in violation of a provision of the Stock
5 Purchase Agreement. (Def. Cross-Mot'n for Summ. J. At 6-8).
6 Plaintiff's employment agreement with defendant, which was
7 incorporated into the Stock Purchase Agreement, provided that
8 plaintiff was not to make any statement or perform any act which
9 could be detrimental to the company. Upon plaintiff's alleged
10 violation of this provision, defendant invoked the set-off
11 provision of the Stock Purchase Agreement quoted above, and began
12 withholding its payments on the Promissory Note. Plaintiff claims
13 that defendant acted in bad faith.


14 The court finds that defendant's motion for summary judgment
15 is premature, and that plaintiff is entitled to discovery on the
16 timetable determined by the parties and the magistrate judge.
17 Defendant may renew its motion upon the completion of discovery if
18 it so wishes.

19
20 **IV. Conclusion**

21 The court therefore denies plaintiff's motion for partial
22 summary judgment (#37) and defendant's cross-motion for summary
23 judgment (#39) without prejudice.

24 **IT IS SO ORDERED.**

25 DATED: This 13th day of March, 2008.

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28 UNITED STATES DISTRICT JUDGE